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No. 71-1597

IN THE

Supreme Court of the United States

October Term 1971

FEDERAL POWER COMMISSION,

Petitioner,

v.

GREENE COUNTY PLANNING BOARD, ET AL,

Respondents.

AMICUS CURIAE BRIEF OF THE INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Independent Natural Gas Association of America (INGAA), having obtained the consent of all parties as required by this Court's Rule 42, submits this brief as amicus curiae in support of the Petition for Writ of Certiorari filed in the above cause by the Solicitor General.

THE AMICUS

INGAA is a non-profit association. Its members include most of the natural gas transmission companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. 15 U.S.C. §§ 717, *et seq.* Their operations account for more than 90% of the gas transported

and sold annually in interstate commerce in the United States. INGAA has participated as an intervenor or amicus curiae before this Court and various United States Courts of Appeal in matters arising out of Federal Power Commission decisions. It undertakes to participate in regulatory and judicial proceedings which are of substantial, industry-wide significance. The *Greene County* decision is such a case.

THE PROBLEM

The current shortage of natural gas is a matter of judicial notice. *Federal Power Commission* v. *Louisiana Power & Light Co.*, ... *U.S.* ....., 40 US L.W. 4636 (1972); *Public Service Commission for the State of New York* v. *Federal Power Commission*, No. 71-1161, D.C. Cir., decided March 29, 1972. FPC Order No. 448 issued January 24, 1972, 37 F.R. 2502. At least 26 cases are pending before the Federal Power Commission involving proposed pipeline curtailment plans. Seven pipeline companies are currently unable to meet their contractual commitments and are curtailing deliveries (See F.P.C. brief to this Court, page 17, *Federal Power Commission* v. *Louisiana Power & Light Company*, Nos. 71-1016 and 71-1040). Many natural gas transmission companies now have pending or contemplate the immediate filing of applications under § 7 of the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.*, involving many millions of dollars and very substantial amounts of natural gas, LNG and SNG.[1]

In *Greene County*, the Court of Appeals has held that the regulations issued by the Commission under the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, relating to the issuance and circulation of environmental statements

[1] LNG refers to liquefied natural gas. SNG refers to synthetic or substitute natural gas.

do not meet the requirements of the National Environmental Policy Act of 1969 (NEPA). 42 U.S.C. §§ 4321, *et seq.* It has determined that *before a hearing can lawfully be held* the Federal Power Commission or its Staff must first issue its own, independently developed environmental statement and further that § 10(E) of the Guidelines issued by the Council on Environmental Quality (CEQ) permitting agencies to prepare draft statements on the basis of hearings held pursuant to the Administrative Procedure Act, 5 U.S.C.A. §§ 551, *et seq.*, does not correctly interpret the requirements of § 102(2)(C) of NEPA.

This decision affects pending, as well as immediately prospective, proceedings before the Federal Power Commission and other agencies. The Commission's regulations under the Natural Gas Act are in all significant respects identical to its regulations issued under the Federal Power Act which the court below held did not satisfy NEPA's requirements. *Cf.* 18 C.F.R. §§ 2.80, 2.81, 2.82. Unless reversed, *Greene County* will impair the Commission's ability to perform its other statutory duties with the consequent adverse effect on the natural gas transmission companies subject to its jurisdiction and on the public in general. This Court should issue the Writ and review the decision of the court below.

ARGUMENT

The lower court's decision is wrong. It represents an unreasonable, impractical construction of the procedural requirements contemplated by NEPA. It goes beyond that which is "practicable" and "possible". *Cf.* NEPA §§ 101(b), 102. It would extend the path a project must follow through the administrative review process into a virtually impassable procedural quagmire. It does all of this unnecessarily,

without regard to the practical consequences to the agencies involved and the public and without advancing, in any respect, NEPA's objectives of preserving or enhancing the environment.

NEPA Does Not Require Hearing Delays

The court below would require the Federal Power Commission to defer hearing on an application until its Staff had completed and circulated its own independently developed environmental statement. The Court plainly does not understand the nature and extent of such statements, the tremendous amount of work involved in their preparation and the number of applications involving major federal projects which the Commission is required to review annually. The Commission's Staff cannot physically perform the task which the court has imposed upon it.

The Federal Power Commission is not a constructing agency. It is a licensing agency. It is required to review applications on the basis of a hearing record developed under the requirements of the Administrative Procedure Act. It does not and cannot control the number of applications submitted for its review and analysis. It cannot be staffed to make the independent studies and investigations which the court would require in the preparation of a detailed environmental statement.[2] It does not have, nor could it reasonably be expected to have, nor need it have, the manpower and technical expertise to *originate* such state-

[2] The Commission's regulations place the initial burden of developing a statement on the applicant. The contents of such statements are prescribed, consistent with the requirements of NEPA and § 6 of the CEQ Guidelines. 18 C.F.R. § 2.80. The detail which the Second Circuit would require in any such statement is presaged by its comment that written testimony based on field research "cannot replace a single coherent and comprehensive environmental analysis . . ." 455 F.2d at 420.

ments. It *must* rely initially on the applicant and other interested parties, including those who oppose projects on environmental grounds.

Indeed the applicants themselves are not customarily staffed for the preparation of detailed environmental statements involving major projects. Such statements are ordinarily prepared by independent research associations such as Battelle Memorial Institute, Arthur D. Little, Inc. and various other public and private organizations acting in consultation with the applicant. Literally dozens of experts working in different technical areas and thousands of man hours may be involved in the preparation of a single environmental statement. For example, in a recent Federal Power Commission proceeding involving the construction of a naphtha gasification plant, the applicant's environmental statement was a compilation of the work of approximately 20 experts. Their total time equaled *more than two and one-third man years.*[3]

Furthermore, apart from the lack of manpower to cope with the sheer mass of workload which the court would inflict on the Staff, in many cases the Staff will have neither the expertise nor the information to prepare an environmental statement before hearing. For example, SNG projects involving the gasification of coal, crude oil, naphtha and other liquid hydrocarbons, which the Commission is considering, are completely dissimilar from projects involving pipelines, power lines and power plants. They involve new technology. They are the result of many thousands of hours and millions of dollars spent in research and development. The environmental statement associated with such projects will ordinarily involve data solely within the knowledge of the

[3] *Tecon Gasification Company, et al,* FPC Docket Nos. CP72-100, et al (Tr. 8:1431-32).

applicant. This will include the technical details of the plant, its layout and design, the processes to be employed, the discharge and handling of waste materials, alternative locations considered, as well as a description of the site and the projected effect on existing ecosystems. The information to be included in the statement must be developed not only from what is physically apparent in the area in which the facility is proposed to be located, it must also be developed from *what is proposed to be installed*. It is in this context that the distinction noted in the Solicitor's Petition between the initiating responsibility for environmental statements by "constructing" agencies and "licensing" agencies can be most clearly appreciated.

The hard fact is that the scope of the work and the time involved require that the statement be developed initially by the applicant and reviewed or otherwise tested in light of cross-examination and other evidence submitted in hearings before any responsible Federal official's report can be issued. *Cf.* NEPA § 102(2)(C). The practical consequences of the *Greene County* decision thus can only be extreme and crippling delay in the administrative consideration of major public projects or, alternatively, perfunctory attempts at technical compliance with the court's requirements. Neither is desirable. Neither is required by NEPA.

Two reasons are given by the court for delaying hearings until the Staff has prepared its "own" environmental statement. Neither is valid. The court states that the "danger" in accepting initially the applicant's statement is the "potential, if not likelihood" that the statement will be based upon "self-serving assumptions" 455 F.2d at 420. If, however, the applicant's statement is self-serving, incomplete, misleading, factually inaccurate or otherwise defective, this can be disclosed through cross-examination during the hearing or otherwise through Staff analysis.

The Commission is sufficiently sophisticated to discount "self-serving" statements. The court's reasoning is akin to a presumption of false swearing by an applicant.

The second and more fundamental basis for the court's conclusion is its view that the Federal Power Commission's Staff is the "responsible Federal official" referred to in § 102(2)(C) of NEPA whose statement together with the comments and views of other agencies is to accompany the proposal through the "agency review processes" and that the hearing must be considered a part of such processes. The court is wrong. Under the Administrative Procedure Act, the information gathering process is *not* concurrent with the "agency review process". Considerations of due process require the separation of the investigation and adjudication functions of federal agencies. *Cf.* Davis, Administrative Law Treatise § 13.02.[4]

NEPA does *not* provide that the agency's statement be a part of a hearing record. When read with the Administrative Procedure Act, it is clear that the "agency review processes" contemplated by NEPA can begin on the basis of a record made *after a hearing* in which all interested parties, including the Staff, have been given an opportunity to participate. This construction is completely consistent with NEPA objectives. It is consistent with the construction given NEPA in the CEQ Guidelines, to which the court referred and which provide for the preparation of the agency's statement *after* a hearing held subject to the APA

[4] In another context, the court below says that it should "defer to the Commission's discretion as to the proper information gathering techniques." See 455 F.2d at 423. The same is true with respect to the preparation of the environmental statement. Contrary to the court's view, the use of data developed during a hearing does not constitute a "delegation of responsibility" with respect to environmental conclusions any more than it does with respect to conclusions reached on the multitude of other issues which the agency is required to consider. See 455 F.2d at 420.

which is preceded by adequate public notice and information to identify the issues and to obtain comments provided for in the Guidelines. CEQ Guidelines § 10(E); 36 F.R. 7724 (April 23, 1971)[5]

NEPA is, as designated, a "Policy" declaration. It is basically intended to assure that the environmental effect of a project is given meaningful consideration in the decision-making process. Its policies and goals are recited by § 105 to be "supplementary to those set forth in existing authorizations of federal agencies". It is to be read with other federal acts. Congress did not intend through NEPA to destroy an agency's power to act effectively in the discharge of its other statutory responsibilities.

Staff Would be Given Effective Veto Power

This leads to the further practical problem associated with the *Greene County* decision. It vests too much control and power in the Staff. The court assumes that Staff is disinterested and totally objective, that it is the "responsible Federal official" referred to in NEPA whose statement is to accompany the proposal through the administrative review processes. The court grievously misunderstands the facts.

Staff is not disinterested. It usually assumes the role of an aggressive adversary. It frequently, indeed usually, acts in opposition to applications for authorization or other relief. It usually asserts to the Commission its own, independently derived position. It is the prosecutor, not the judge. *Cf.* 5 U.S.C. § 554. Its individual members frequently hold positive views with respect to particular projects or

[5] The contention that the Commission's regulations should be upheld because they complied with the CEQ Guidelines was dismissed by the court below as "superficially appealing". 455 F.2d. at 421.

proceedings which may or may not reflect Commission thinking.

Under *Greene County,* a segment of the Staff, by failing to prepare an environmental statement or simply by delaying the completion and filing of such a statement, could defeat a project which it opposed just as effectively (and perhaps more so) than it could by open opposition during a hearing. It is given virtual veto power. The applicant is left with no effective remedy available to it.

Clearly, the right to a hearing is denied by a rule which would create procedural error from an *adversary party's* refusal to prepare or its inadequate preparation. It may likewise be denied by imposing such extensive and burdensome conditions precedent to a hearing that an applicant's project may collapse before the agency review process can begin. It is submitted that this was not the intent of NEPA. It is, however, the effect of *Greene County.*

Review of NEPA by this Court is Required

Important issues are posed by *Greene County.* Maintaining a reasonable balance between environmental protection and the necessities and environmental amenities provided by adequate supplies of energy is a central problem *now.* The lower courts have tended to read severe procedural requirements into NEPA.[6] The effects of delay incident to their particular views with respect to the implementation of NEPA are dismissed with stoic resignation and with no apparent regard for practical considerations. Thus the court below states that "delay unfortunately is incident to our

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[6] *Cf. Natural Resources Defense Council, Inc.* v. *Morton,* 458 F.2d. 827 (D.C. Cir. 1972); *Calvert Cliffs' Coordination Committee, Inc.* v. *Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971).

mandate". Quoting the decision of the District of Columbia Court of Appeals in *Calvert Cliffs* it says:

> "Delay is a concomitant of the implementation of the procedures prescribed by NEPA, and the spectre of a power crisis 'must not be used to create a blackout of environmental consideration in the agency review process'". 455 F.2d at 422, 423.

Here, however, delay is clearly *not* a concomitant of the implementation of *NEPA's* procedures. It is a concomitant of the procedures which the *court* would require. The Commission's regulations, which the court held inadequate, could not by any reasonable construction be considered to impose a "blackout" of facts relating to the environmental consequences of projects under review. To the contrary, they provide the most complete, efficient technique for developing environmental information. The procedural requirement imposed by the court of a separate, independent Staff statement *before* hearing would add nothing more.

If the agency review process is not to come to a grinding halt, it is imperative that this court take jurisdiction, consider NEPA in the light of its declared goal of requiring a "practicable," reasonable consideration of environmental issues prior to agency action, and clarify for the federal agencies, the regulated utilities and other interested parties, the requirements which NEPA imposes. Impairing the Commission's ability to act can only further aggrevate the current gas supply shortage.

In the final analysis, it is not the agencies, nor indeed the regulated utilities which will be most affected by the additional cost and delay of attempts at compliance with *Greene County*. The public ultimately pays the cost. It suffers the inconvenience.

CONCLUSION

Greene County was incorrectly decided by the court below. Unless corrected, it can adversely affect pending and prospective projects before the Federal Power Commission and other federal agencies. The basic purpose of NEPA is not served by the court's decision. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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